

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL A. CERNAK,

Defendant.

2:03-CR-00534-PMP-(RJJ)

REPORT & RECOMMENDATION
OF UNITED STATES
MAGISTRATE JUDGE

(Defendant's Motion to Suppress (#56))

This matter came before the Court for a hearing on Defendant Michael A. Cernak's Motion to Suppress (#56). The Court has considered the Motion (#56), the Government's Response (#59), the Defendant's Reply (#61), as well as the testimony and evidence presented at the evidentiary hearing.

FACTUAL BACKGROUND

On the afternoon of November 10, 2003, the Wells Fargo Bank at 10850 West Charleston Blvd., Las Vegas, Nevada, was robbed. The description of the bank robber and details regarding the robbery were similar to five previous bank robberies in the community. Based on information previously received from a citizen informant, as well as the details regarding this robbery, four FBI agents went to the residence of Defendant, Michael A. Cernak, at 3633 Lake Shore Court immediately after notice of the robbery.

1 At approximately 3:20 P.M. that afternoon, Cernak drove his green Maxima with New
2 Mexico license plates into his driveway on Lake Shore Court, a cul-de-sac. Immediately, the FBI
3 agents followed Cernak and parked their vehicles on each side of his. Upon seeing them, Cernak
4 reversed his vehicle and backed out of the driveway and into the street. Special Agent Wenko,
5 immediately positioned himself in front of Cernak's vehicle. Agent Wenko pointed his rifle, a MP5
6 at the defendant. The other FBI agents positioned the two vehicles to block Cernak's exit and then
7 all held guns on Cernak as he sat in his vehicle with the engine running. Agents Wenko and Beasley
8 yelled commands to Cernak as he sat in the vehicle. He was ordered to turn off the car ignition, he
9 did not. He was ordered to put his hands up, which after some delay, he did. He was ordered to get
10 out of the car, but did not comply. Finally, Agent Wenko opened the door of the car and pulled
11 Cernak out. A struggle ensued as Cernak tried to flee. Cernak head-butted one agent causing a cut
12 on his face. A police scanner fell from Cernak during the struggle. After he was placed on the
13 ground and handcuffed, the four agents put their weapons away and walked Cernak toward the
14 vehicles. Again, Cernak tried to flee, and was taken to the ground by the agents. Shackles were then
15 place on his ankles. At this point, Cernak began crying. The agents testified that his conduct is not
16 unusual based on their experience in other arrests.

17 Before being transported from the scene, Cernak was allowed to speak with his girlfriend
18 through the window of the police vehicle he was seated in. No Miranda rights were given at the
19 scene. No interrogation took place at the scene.

20 Agents Beasley and Green transported Cernak to the FBI office. During the twenty minute
21 trip, Cernak said that he was going to prison for a long time. Agent Beasley's response was that
22 Cernak could not talk about the robbery at that time. A conversation ensued about Cernak's care and
23 breeding of dogs. He indicated that he currently had twelve chihuahuas. Agent Beasley testified that
24 Cernak was calm and that there was no odor of alcohol in the car.

25 At the FBI office, Cernak was taken to the third floor interview room where he was
26 handcuffed by his non-writing hand to the desk. Asked whether he was thirsty, hungry or needed to
27 use the restroom, Cernak answered that he was thirsty and hungry. A Coke and cookies were
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1 provided and Cernak consumed them. Special Agent Green conducted the interview. She read out
2 loud the Miranda Waiver Form (Exhibit 1). Cernak appeared to read it also and then signed it. Agent
3 Green during the course of the interview asked Cernak if he would consent to a search of his
4 residence and vehicle. He agreed and Agent Green reviewed and read the Search Permission Form
5 (Exhibit 3) which Cernak then appeared to read and sign. Finally, Cernak was asked if he would like
6 to write a letter of apology to the victims at the bank. He agreed with this idea and hand wrote a three
7 page letter. (Exhibit 5). The entire interview at the FBI office lasted approximately sixty to seventy-
8 five minutes and is memorialized in the 302 Report (Exhibit 2) prepared by Agent Green.

9 Agent Beasley and Agent Green testified that the interview was conducted in conversational
10 tones and that Cernak appeared to understand and appropriately answer all questions. No guns were
11 displayed by the agents during the interview. No threats were made by the agents during the
12 interview. The defendant did not appear to be under the influence of alcohol or drugs during the
13 interview. In regard to the consent to search, no reference or threat of a search warrant was made to
14 Cernak by the agents. Agent Green noted that Cernak demonstrated very accurate recall regarding
15 the robbery that day, as well as the five previous bank robberies. She also noted that he responded
16 with greater detail than she expected. When photographs and notes from the robbery on November
17 10, 2003, and previous robberies were presented to Cernak, he identified himself, and his
18 handwriting and made an appropriate notation on each item during the interview. The agents also
19 testified that no promises or guarantees were given as incentives for Cernak's cooperation during the
20 interrogation.

21 According to Agent Beasley, Cernak told them that he had purchased and consumed a
22 twenty-four ounce beer earlier that day before the robbery. However, after drinking the beer, he took
23 a nap and then used the treadmill for awhile before going to the Wells Fargo Bank. Cernak also told
24 them that he used no drugs that day. Cernak waived his rights and testified at the hearing. He
25 confirmed the single beer that he had that day, but did tell a story of using controlled substances,
26 including LSD, marijuana and "huffing" on paint the night before. He also stated that he did stop
27 crying before the interview. At the end of the interview, Agents Purcell and Wenko arrived at the
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1 FBI office. Cernak apologized to Agent Purcell for the injury he caused. Testimony was provided
2 during the hearing regarding Cernak's mental condition and general competency. Dr. Jasmine
3 Tehrani, a clinical psychologist with Los Angeles County, and a contract employee with the Federal
4 Bureau of Prisons, testified regarding a previous evaluation of Cernak. Dr. Tehrani's evaluation
5 concluded that Cernak had a psychotic disorder not specified and polysubstance dependence. Further,
6 based upon testing and evaluation, Dr. Tehrani concluded that Cernak was in the mild mental
7 retardation to borderline range of intellectual functioning with an IQ of 61 (Defendant's Exhibit B).
8 However, Dr. Tehrani also noted that some evidence of potential malingering was present in the
9 testing and evaluations of Cernak. Finally, and most significant, Dr. Tehrani testified that Cernak's
10 mental competency would not prohibit a valid waiver of rights. Further, Cernak's psychological
11 condition does not undermine a waiver of rights. In fact, Dr. Tehrani was unable to offer any opinion
12 whether the defendant voluntarily waived his Miranda rights and consented to the search of his
13 residence and vehicle. Dr. Tehrani suggested, consistent with the law that the observations of the
14 arresting and interviewing officers would be more valuable in assessing Cernak's ability to
15 understand and waive his rights.

16 Defendant, Michael A. Cernak, has been charged in this case with multiple bank robberies.
17 Cernak brings this motion to suppress any evidence that was obtained as a result of the November
18 10, 2003, interrogation because he did not voluntarily, knowingly and intelligently waive his right
19 to remain silent. Further, he argues that the agents knowingly took advantage of his diminished
20 mental capacity. The facts are contrary to Cernak's argument.

21 DISCUSSION

22 "A heavy burden rests on the government to demonstrate that the defendant knowingly
23 and intelligently waived his privilege against self-incrimination and his right to retained or
24 appoint counsel." Miranda v. Arizona, 384 U.S. 436, 475 (1966); see also Colorado v. Connelly,
25 479 U.S. 157, 165 (1986). The government is required to meet this burden by establishing by a
26 preponderance of the evidence that a defendant waived his Miranda rights. Colorado v.
27 Connelly, 497 U.S. at 169. To prove a valid waiver, the government must show that (1) the
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1 waiver was voluntarily made and not the product of coercion, and (2) that at the time of the
2 waiver the defendant understood both the nature of the right being waived and the consequence
3 of the waiver. Moran v. Burbine, 475 U.S. 412, 421 (1986). To find a waiver involuntary,
4 “coercive police activity is a necessary predicate.” Connelly, 497 U.S. at 167. In determining if
5 the waiver was the voluntary product of a rational and free will, the court must look at the totality
6 of the circumstances. Id.; United States v. Orso, 266, F.3d 1030, 1039 (9th Cir. 2001). “A
7 defendant’s mental state alone does not make a statement involuntary.” United States v. Turner,
8 926 F.2d 883, 888 (9th Cir. 1991) *citing* Connelly, 479 U.S. at 169-171.

9 Cernak’s claim that the agents took advantage of his intoxicated or drug-impaired
10 condition, while emotionally distraught and being the subject of a low IQ and psychotic disorder
11 is not substantiated by the evidence. The evidence at the evidentiary hearing, does not
12 demonstrate an impaired condition. Further, there is no evidence that the agents coerced or took
13 advantage of the defendant during the interrogation. The testimony of Dr. Tehrani, eliminates any
14 ability of Cernak to rely upon his low IQ or psychotic disorder as a bar to voluntary waiver of his
15 rights.

16 Voluntariness is determined by looking at a totality of the circumstances, including the
17 details of the interrogation and the characteristics of the suspect. Schneckloth v. Bustamante, 412
18 U.S. 218 (1973). Everything in this case as presented at the evidentiary hearing indicates that
19 Cernak voluntarily, knowingly and intelligently waived his rights under Miranda. Additionally
20 based on a totality of the circumstances, a consent to search his house and automobile were also
21 given voluntarily. Although in custody at the time he gave consent to search, Cernak had been
22 given his Miranda warnings and was also told that he had a right not to consent. No weapons
23 were displayed, no threats were made and he was not told that a search warrant could be obtained
24 if he did not consent. The defendant’s Motion to Suppress (#56) should be denied.

25 RECOMMENDATION

26 Based on the foregoing and good cause appearing therefore,

27 IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that the
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1 Defendant's Motion to Suppress (#56) be **DENIED**.

2 **NOTICE**

3 Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must be in
4 writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that
5 the courts of appeal may determine that an appeal has been waived due to the failure to file
6 objections within the specified time. Thomas v. Arn, 474 U.S. 140, 142 (1985). This circuit has also
7 held that (1) failure to file objections within the specified time and (2) failure to properly address and
8 brief the objectionable issues waives the right to appeal the District Court's order and/or appeal
9 factual issues from the order of the District Court. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir.
10 1991); Britt v. Simi Valley United Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983).

11 DATED this 10th day of July, 2006.

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15 ROBERT J. JOHNSTON
16 United States Magistrate Judge
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